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No. ....

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IN THE  
**Supreme Court of the United States**

October Term, 1983

ROBERT VANCE, D.O.

*Petitioner,*

VS.

STATE OF UTAH,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
STATE OF UTAH**

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## **Questions Presented**

### **I.**

Whether the revocation of a professional license for unprofessional conduct, without further definition, violates due process.

### **II.**

Whether revocation of a professional license by a panel contaminated by an unqualified member, violates due process.

### **III.**

Whether revocation of a professional license under a statute applicable to a different profession violates due process.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF UTAH**

Petitioner Robert Vance respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Utah. That Court upheld the revocation of petitioner's license to practice Osteopathy in the face of claims that revocation hearings denied petitioner due process.

### **Opinions Below**

The judgment and opinion of the Supreme Court of Utah, one Justice dissenting, was issued on August 22, 1983. Rehearing was denied on October 24, 1983.

### **Statement of Jurisdiction**

The final decision of the Supreme Court of Utah was rendered on a motion for rehearing on October 24, 1983 after a principal decision on August 22, 1983. The jurisdiction of this Court is invoked under 28 United States Code, §1257(3).

### **Constitutional Provision Involved**

U.S. Const., Amend. XIV:

" . . . No state shall . . . deprive any person of life, liberty, or property, with due process of law . . . " .

### **Statement of Facts**

Petitioner is a Doctor of Osteopathy. He was charged, by the licensing authority of the State of Utah, with violating the act relating to the practice of medicine.<sup>1</sup>

A committee of Osteopaths found him to have violated the Osteopathic law, under which he was not charged.

The committee was composed of three members. One of those members did not meet two of the statutory requirements for appointment to such committee. She had neither

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<sup>1</sup> Medical practice and Osteopathic practice are governed by separate Act in Utah. Medicine by Utah Code Ann., 1953 §58-12-36, Osteopathy by Utah Code Ann., 1953, §58-12-18.

resided in Utah the required time nor practiced Osteopathy the required time.<sup>2</sup>

The committee's recommendation of revocation was sustained on appeal to the Supreme Court of Utah. Rehearing was denied. A Stay was issued until December 5, 1983, pending petition for writ of certiorari to this Court.

## **Reasons for Granting the Petition**

### **I.**

#### **Revocation of Petitioner's License for "Unprofessional Conduct" Without Further Definition Violates Due Process.**

Petitioner, a licensed Osteopath in the State of Utah, was charged with violating professional standards (Utah Code Annotation §58-12-36). The Department of Registration failed to promulgate rules defining unprofessional conduct.

Although Utah's Code mandates the term "unprofessional conduct" be defined in order to notice licensees of the type of conduct which subjects their license to revocation, no such rules were promulgated. Petitioner was charged and found guilty of violating standards of conduct deemed by the committee, for the first time, to be unprofessional.

Rules of conduct can and should be defined which provide some guidelines more specific than the vague term "unprofessional conduct". Unless some specific meaning is infused

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<sup>2</sup> The requirements are set out in Utah Code Ann., 1953, §58-1-6 of the Utah statutes which provides in pertinent part as follows:

... Each member of a committee must have had a license to practice in this State for a period of five years immediately prior to his appointment. ... each member shall have been a resident for a period of 3 years and shall be domiciled within the State of Utah.



into that term, every practitioner of a licensed profession or vocation could be placed in jeopardy for every out of the ordinary act, even though it may represent a significant and valid advancement in the calling.

The due process clause of the United States Constitution guarantees no person shall be deprived of life, liberty or property for arbitrary reasons. This Court has emphasized the essence of the due process clause is that "all persons are entitled to be informed as to what the State commands or forbids." *Popachriston v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L. Ed. 2d 110 (1972). Because the right to carry on a profession or work is essential to the concept of liberty this Court emphasized, any statute which threatens that right without providing notice to potential victims of such legislation is null and void. *Barsky v. Board of Regents of University of New York*, 347 U.S. 442, 74 S. Ct. 650, 98 L. Ed. 829 (1954).

This Court emphasized the fundamental liberty involved and the crucial need to uphold due process protections:

Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on Politics, "A man has a right to be employed, to be trusted, to be loved, to be revered." It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.

***Barsky v. Board of Regents of the University of New York, supra.***

Any statute which is indefinite in its terms will fail to meet the substantive Due Process requirements. If, as in this case, a person is prevented from working in his profession because a statute is drawn to allow the revocation of his license by mere opinion, that person will be found to have been denied his constitutional rights. "Professional conduct" is a term that has repeatedly been used to allow discriminate regulation of the professions. Courts in a variety of jurisdictions have repeatedly struck down the term as open to vagueness. *Little v. Streater*, 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981).

In 1905 the Court of Appeals for the District of Columbia held the term "unprofessional" vague. In that case, the Court stated:

[t]he underlying question involved in all cases may arise is whether the courts can uphold and enforce a statute whose broad and indifferent language may not apply not only to a particular act about which there would be little or no difference of opinion, but equally to others about which there might be radical differences, thereby devolving upon the tribunals charged with the enforcement of the law the exercise of an arbitrary power of discriminating between the several classes of acts.

*Czarra v. Board of Medical Supervisors*, 25 App. D.C. 443, 453 (1905).

The Czarra Court continued:

"Unprofessional or dishonorable conduct," for which the statute authorizes the revocation of a license that has been regularly obtained, is not defined by the common law, and the words have no common or generally accepted signification. What conduct may be of either

kind remains, as before, a mere matter of opinion. In the absence of some specification of acts by the law-making power, which is alone authorized to establish the standard of honor to be observed by persons who are permitted to practise the profession of medicine, it must, in respect of some acts at last, remain a varying one, shifting with the opinions that may prevail from time to time in the several tribunals that may be called upon to interpret and enforce the law. As has been said by the Supreme Court of the United States in a case involving the same principle, the question must be reduced to one of fact, as contradistinguished from mere opinion.

*American School of Magnet Healing v. McAnnulty*, 187 U.S. 94, 106, 23 S. Ct. Rep. 33, 47 L. Ed. 90, 95 (1902).

This Court endorsed and approved the authority of *Czarra* in *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1939). In *Czarra* the court held that the conduct was unprofessional by most people's standards, but struck down the statute as unconstitutional for vagueness.

The Federal courts have held the term "unprofessional conduct" vague and therefore violative of Due Process. *Yoshizawa v. Hewitt*, 52 F. 2d 411 (9th Cir. 1931). In that case the court found "gross carelessness and manifest incapacity" relating to the physician's method of treatment as definite by objective standards, while "unprofessional and dishonorable" conduct relate to professional ethics and personal conduct and subjective. *Yoshizawa, supra*.

Therefore, the terms violate the 14th Amendment when applied to revoking professional licenses.

In this case, Petitioner had no notice of what specific standard of conduct he had allegedly breached. When the

committee which found him guilty issued their findings, the standard was first made clear. Assuming *arguendo*, his conduct had been questionable by all standards, he was entitled to notice of the specific standard he would be judged by. He had none. This statute must be declared null and void as to the judgment of revocation against Petitioner.

## II.

### **Trial of Petitioner by a Tribunal Which Was Contaminated by a Disqualified Member Violates Due Process.**

Petitioner was, as discussed previously, brought to answer charges under a statute which covered another profession and for unprofessional conduct. He was tried by an administrative tribunal which was composed of three osteopaths who subjectively found his conduct "not in light of the professional standards of osteopaths." The Utah State Code mandates all three tribunal members to be residents of the State for three years and practicing with the board for five years. Utah Code Annotated §58-1-5 (1953). One of the members of the tribunal met neither of these qualifications. She was neither a resident of the State for three years nor had she been licensed in the State for five years. The courts have held personal financial interest may disqualify a member of the tribunal. However, disqualification will not be permitted to destroy the only tribunal with power in the premises. *Brinkley v. Hassig*, 83 F. 2d 351 (10th Cir. 1936). This is not the case here. This disqualified member could easily and statutorily have been replaced by a resident member of the osteopathic community with experience and expertise beyond two years. It was essential to the State's burden to show Petitioner had acted beyond the professional boundaries of osteopaths. To allow

a disqualified member of the tribunal, a novice in the profession, to create those standard flies in the face of objectivity and is in full disregard for due process.

This Court has repeatedly held disqualification of tribunal members and the subsequent taint carries to administrative adjudicators, *Gibson v. Berryville*, 411 U.S. 564 (1972), and emphasized the due process clause applies to administrative tribunals. *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1926) citing *Meyers v. Shields*, 61 Fed. 713 (Cir. Ct. N'D Ohio 1894). That Court stated "When a State deprives a person of liberty or property through a hearing held under statutes and circumstances which necessarily interfere with the course of justice, it deprives him of liberty and property without due process of law." *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 *supra*. See also *Moore v. Dempsey*, 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 43, (1922) and *Frank v. Magnum*, 237 U.S. 309, '35 S. Ct. 582, 59 L. Ed. 969 (1914). This Court emphasized in *Tumey v. Ohio*, *supra*. the 14th Amendment guarantees a fair and impartial tribunal.

It is crucial to examine the particular facts and local realities of any given case must determine whether there is an actual or apparent impropriety that amounts to a denial of due process. *Marlboro Corporation v. Association of Independent Schools, Inc.*, 556 Fed. 2d 78 (1st Cir. 1977). As discussed, judging "unprofessional conduct" without objective standards is a denial of due process. For these reasons experienced osteopaths are presumed to be more familiar with the customs and practices in the trade. It is questionable whether such a standard provides Petitioner with notice of such standards. Assuming *arguendo*, those standards were available, a professional of two years, disqualified by the Board's own standards, cannot make this ob-

jective determination. Her participation in the tribunal was opinion and therefore bias.

### III.

#### **Finding an Osteopath Guilty of Violations of an Act Relating Only to Doctors of Medicine, When an Osteopathy Act Exists, Violates Due Process.**

Petitioner was charged with violating U.C.A. 1953 §58-12-36. This statute reads:

58-12-36. Medical Practice Act — "Unprofessional conduct" defined. — The words "unprofessional conduct" as relating to the practice of medicine are defined to include:

The *Medical Practice Act* states the section covers only the practice of medicine and in §58-12-38 specifically provides: "This chapter is designed solely for the regulation of the practice of medicine . . . and does not comply to the regulation of the healing arts. . . ." Petitioner, an osteopath, is covered by Section U.C.A. §58-12-18 (1953). Justice Stewart, of the Utah Supreme Court, in his opinion states "the Department had no statutory authority to revoke appellant's [Petitioner] license under §58-12-18. (Appendix, page 50.)

Constitutional law limits such application of statutes. It is redundant but necessary to stress this error violates substantive due process, procedural due process and undercuts any notions of justice were this conviction allowed to stand.

*Lynch v. Tilden Produce Company*, 265 U.S. 315, 320, 322, 44 S. Ct. 488, 68 L. Ed. 1034-1036 (1923) held no matter what facts exist to suggest a statute should have been drafted to include the instant case, the legislative intent must have been strictly adhered to. In that case, a better



product which increased its absorption of moisture could not be considered "adulterated" since the statute charged had no such language or intent to cover such a situation. To hold otherwise would be to violate due process.

*Miller v. United States*, 294 U.S. 435, 439, 55 S. Ct. 440, 79 L. Ed. 977, 980, 981 (1935) mandated administrative bodies may not amend laws by extending or reinterpreting statutes. "The only authority conferred, or which could be conferred by the statute, is to make regulations to carry out the purposes of the *Act*, not to amend it." *Miller v. United States*, 294 U.S. 435 at 441. In this case the Department of Regulation attempted to use a statute which blatantly only covers medical doctors to proscribe the osteopath Petitioner's behavior. This is in clear violation of the due process clause. "A regulation which operates to create a rule out of harmony with the statute is a mere nullity." *Manhattan G. E. Co. v. Commissioner of Int. Rev.*, 297 U.S. 129, 56 S. Ct. 397, 80 L. Ed. 528 (1935).

Osteopathy is a profession regulated by Utah statutes. These statutes were interpreted to be too loose to cover Petitioner's alleged complaints. Therefore, the Department of Regulations redefined the *Medical Practice Act* to cover the behavior to which Petitioner, without notice, was required to defend. This set of facts is in defiance of due process. The statute has no application to Petitioner. *Dixon v. United States*, 381 U.S. 68, 74, 85 S. Ct. 1301, 1305, 14 L. Ed. 2d 223 (1964) and *Brannan v. Stark*, 342 U.S. 451, 72 S.Ct. 433, 96 L. Ed. 497 (1952).

Although it appears elementary to establish statutes be strictly construed, the instant case calls for such reiteration of the common law rule. "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta v. New Jersey*,

306 U.S. 451, 452, 59 S. Ct. 618, 83 L. Ed. 888 (1939). See also *Stomberg v. California*, 283 U.S. 359 (1930) and *Lovell v. Griffin*, 303 U.S. 444 (1937).

The rule stated and applied in this instant case, "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ to its application, violates the first essential of due process of the law." *Lanzetta v. New Jersey*, *supra*. at 453. Petitioner, an osteopath, could have had no notice that he was subject to statutes covering medical doctors. This violation is the essence of a substantive due process violation.

### CONCLUSION

The Petitioner has been deprived of his property rights in his license to practice Osteopathy with significant violations of due process of law. For that reason, Petitioner prays that a writ of certiorari issue to the Supreme Court of the State of Utah.

Respectfully submitted,

JOHN A. BURGESS

*Attorney for Petitioner*



**Certificate of Service**

This is to certify that three (3) copies of the foregoing Petition For Writ of Certiorari were mailed, postage prepaid on this 23rd day of November 1983 to Stephen G. Schwendiman, Assistant Attorney-General, 236 State Capitol Building, Salt Lake City, Utah.

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Attorney for Petitioner